# 'What if …?': How the 'FirstRand' commissions case could affect insurance: Part 2: The regulatory dimension

18 June 2025 Jeremy Irving

*First published on Thomson Reuters.*

This is the second in a series on the ramifications for the insurance industry of the motor finance (consumer credit) commission cases in which appeals were heard in the Supreme Court ("**SC**") 1-3 April 2025, following the Court of Appeal ("**CA**") Judgment in October 2024 (the "**CA Judgment**").

This series considers whether the CA Judgment, if accepted in full by the SC, could support arguments that an insurance intermediary, and/or an insurer, could be legally liable for failing to disclose fully to an insured the full amount of remuneration which the intermediary has received or will receive in respect of the policy which the intermediary helped to conclude.

While an intermediary's role in concluding contracts has the potential to include different activities stipulated in the Financial Services and Markets Act 2000 ("**FSMA**") Regulated Activities Order 2001 / 544 (the "**RAO**"), this series will focus on the activity under RAO Article 25(1) of "*making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite*" an insurance contract.

## The essentials of the CA judgment

As set out in the first article: "*The dealers were the sellers of … cars, but … were also acting as credit brokers on behalf of the claimants ... They therefore owed the claimants the "disinterested duty"…*"

The CA also found a "*parallel fiduciary duty*", but this will be looked at in a later article.

## The regulatory aspect

The CA focused on the definition of 'credit broking' activity at RAO Art 36A:

"*effecting the introduction of an individual or relevant recipient of credit who wishes to enter into a consumer hire agreement to a person ("P") with a view to P entering into by way of business as owner a regulated consumer hire agreement.*"

The CA held: *"All of the dealers in these cases were undoubtedly acting as credit brokers, a role they undertook on behalf of the claimants they were introducing to the lenders … Indeed in Hopcraft the standard terms of business between Close and Jordans expressly "set out the terms and conditions upon which* [Close] *shall deal when* [Jordans] *introduces a Customer to* [Close] …"

In relation to the regulatory obligations of the dealers as credit brokers, the CA found "*breaches of the CONC Rules*" relating to commission disclosure, but that these obligations are "*premised on credit brokers having a duty to be impartial in the first place*" because of the nature of brokers' relationship with borrowers. The common law position pre-dates and is reflected in the regulatory position.

The CA also cited Plevin v Paragon Personal Finance [2014] UKSC 61. The central point in Plevin was whether the relationship between a borrower and a lender (which was also an insurance intermediary) was unfair for the purposes of s140A of the Consumer Credit Act 1974. The SC held that it was unfair, because of the lender's non-disclosure that it would receive 71.8% commission from a £5780 premium for a PPI policy for a non-commercial customer, even though the relevant regulatory rule (the Insurance Conduct of Business rulebook, as was):

*"requires the disclosure by an insurance intermediary … of commissions receivable by it or its associates, but only to commercial customers and then only if the customer asks for the information."*

While the SC held that "*Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer … given that she was not paying [them] …*" it also held that:

"*… at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. At what point is difficult to say, but wherever the tipping point may lie the commissions paid in this case are a long way beyond it.*"

The size of commission is significant for this series because the SC recognised that "*Commissions payable to intermediaries were high, typically between 50 and 80 per cent of gross written premium for policies sold in connection with a personal loan.*" As discussed in the previous article, there is a commonly accepted (although not incontrovertible) proposition in insurance to the effect that commission need only be disclosed if it is greater than the usual rate for a particular type of insurance. In the case of PPI in Plevin, the SC did not accept that the commission rate, even if typical for that product line, was exempt from disclosure.

# The regulatory duty

## The nature of commission

The commission disclosure obligations facing "*any insurance intermediary in contact with the customer*" (ICOBS 1 Annex 1, part 2, paragraph 4) are in general set out in ICOBS 4.3 (the meaning of 'in contact' will be addressed in a later article).

Under ICOBS 4.3-7 R:

"*… before the conclusion of the … contract of insurance … an insurance intermediary must provide … information … on the nature of the remuneration received in relation to the contract of insurance …*" (emphasis added).

"*Remuneration*" means: "*any commission, fee, charge or other payment, including an economic benefit of any kind or any other financial or non-financial advantage or incentive offered or given …*" including "*remuneration that is not guaranteed or which is contingent on meeting certain targets*".

The guidance at ICOBS 4.3-3 that:

"*… a firm should include all remuneration which [it] … receives, or may receive in relation to the distribution of the contract of insurance. This includes remuneration:*

(1) *provided indirectly by … another firm within the distribution chain; or*

(2) *provided by way of a bonus (whether financial or non-financial) … where this … is contingent on the achievement of a target to which the distribution of the particular contract of insurance could contribute. For example … profit share arrangements, overriders or other enhanced commissions.*"

## The amount of commission

The rule as to the amount of commission is at ICOBS 4.4,

"*(1) An insurance intermediary must, on a commercial customer's request, promptly disclose the commission that it … receives in connection with a policy.*

*(2) Disclosure must be in cash terms … To the extent this is not possible, the firm must give the basis for calculation.*"

In this instance, 'commercial customer' means "*not a consumer*" (ie "*any natural person acting for purposes outside his trade, business or profession*").

ICOBS 4.4.3 (2) G gives guidance from 2008 "*where it is usual for* [an insurance intermediary] *to be remunerated by way of commission paid by the insurer out of premium payable by the customer, then there is no duty to account* [ie disclose the specific amount of commission] [unless] *the customer asks …*"

# Conclusion

Plevin explained that compliance with the regulatory rules in 2006 on insurance commission disclosure did not prevent undisclosed large commissions from creating unfairness for statutory purposes.

The CA Judgment found that breaches of regulatory rules amounted to breaches of the common law disinterested duty.

It also found that superficially technical compliance with regulatory rules – where commission disclosures were "*buried in the small print*" – was insufficient for compliance with the disinterested duty.  It is worth noting that ICOBS' framework for disclosures as to insurance commissions is similar to the rules in CONC 4.5.3R and 4.5.4R on credit broker commission.

The above suggests only full compliance with ICOBS (with the Consumer Duty also a factor) can prevent an intermediary from breaching any disinterested duty it owes.

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